IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 1

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, AND HAROLD E. SULLIVAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,
Counsel for Respondents—Cross-Petitioners The Shotwell Manufacturing Company, Byron A. Cain and Harold E. Sullivan.

WINSTON, STRAWN, SMITH & PATTERSON,
38 S. Dearborn Street,
Chicago, Illinois,

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
130 E. Randolph Drive,
Chicago, Illinois,
Of Counsel.

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JURISDICTION.

Jurisdiction, asserted to lie under 28 U. S. C., Sec. 1254(1) giving this Court power to review, by certiorari, cases in the Courts of Appeal, is questioned:

This Court's order of February 25, 1957, in form *granting* certiorari "limited to the issues raised in the [Solicitor General's] amended motion to remand, etc.," was actually a *denial* of everything raised by the petition for certiorari and a granting of leave, at least temporarily, to present a wholly new motion here. If the Court proceeds with this cause on the question now presented an original motion

to allow the prosecutors a partial new trial on the ground of allegedly newly discovered evidence it will not be reviewing anything that has been ruled on by the Court of Appeals. The practice heretofore has been for this Court not to entertain contested motions for a new trial on the ground of newly discovered evidence but to refer them (assuming they show surface plausibility) to the appropriate Court of Appeals (Cf. *U. S. v. Johnson*, 319 U. S. 503, 327 U. S. 106. *Mesarosh v. U. S.*, 352 U. S. 1, in which the Solicitor General confessed that a conviction might have been obtained erroneously, was the reverse of the situation at bar in which the prosecution seeks to validate a conviction).

QUESTIONS PRESENTED.

1. May the prosecution, after verdict of guilty in a criminal case, reopen the record and put in more evidence in an attempt to validate an otherwise invalid verdict?

2. If it be assumed that the prosecution may make a motion for a partial new trial, or for a new "determination" (Cf. Suppl. to Motion to Remand, p. 5), does the instant motion meet the tests of a motion for a new trial, of a new "determination," on the ground of newly discovered evidence?

Subsidiary Question.

3. Assuming that a motion of the kind involved may be made by a prosecutor, should it be presented here or to the Court of Appeals?

STATUTE INVOLVED.

28 U. S. C., Sec. 2106, giving this Court power to remand a case for further proceedings, is not involved because it only defines the various orders this Court may enter in a

case properly before it on review. It is not a grant of original jurisdiction.

STATEMENT.

The Statement tendered by the Solicitor General roams the record at large and contains much material which is wholly irrelevant to the issue posed by this Court's order of February 25, 1957, limiting consideration to the issue raised, not by the petition for certiorari, but by the Amended Motion to Remand and Answer thereto. We therefore tender the following:

Proceedings Below.

Respondents to the Motion to Remand were indicted in 1952 for alleged falsity in the income tax returns of Shotwell Mfg. Co. (now named Homan Mfg. Co.) for 1945 and 1946. They asserted, by motion to dismiss, immunity from prosecution because in February, 1948, acting in reliance upon repeated promises of immunity from criminal prosecution by Secretaries of the Treasury and other authorized officials to those who voluntarily disclosed tax irregularities before investigation was initiated, they had voluntarily disclosed such to Ernest J. Sauber, then Chief Deputy Collector (subsequently District Director of Internal Revenue in Chicago). The motion was denied by the District Court (and subsequently by the Court of Appeals) upon the ground that even though Executive officials had promised immunity, their promise was not judicially enforceable.

After the motion to dismiss had been overruled in the District Court, respondents, before trial, moved to suppress evidence which they had produced for the Treasury in reliance on its promises of immunity. A hearing was held and evidence was taken on this motion. The motion to suppress was denied in the District Court, trial ensued,

and respondents were convicted. Upon appeal the Court of Appeals, without passing upon numerous other asserted errors, set aside the convictions on the ground that the motion to suppress should have been allowed and directed a retrial of the case.

The Certiorari Applications.

The Solicitor General sought certiorari for review of the Court of Appeals decision (and respondents filed a conditional cross petition). Such review was denied by this Court's orders of February 25, 1957. It is for this reason that we say much of the "Statement" in the Government's brief, constituting as it does a subtle argument that there were factors which might have warranted certiorari, is irrelevant and serves only to confuse the present issue. A restatement, we believe, is necessary to place in proper focus the motion that is before the Court:

The gist of the indictment and Government proof as to the merits of the case was that in 1945 and 1946 Shotwell Mfg. Co., a Chicago candy manufacturer, received approximately $400,000 unreported income by way of cash "premiums" or "overages" above ceiling prices on sales of candy to one David Lubben (or companies he controlled) of New York. Shotwell was a substantial company and actually paid $827,000 taxes for those years (see indictment figures R. 5). The gist of the defense was that Lubben had paid cash premiums for a portion of that time but in a far smaller amount (approximately $160,000) than he claimed; that this *gross income* had been expended by the company in payment of over ceiling "premiums" on raw corn which was then sold to corn refiners at ceiling prices, with the refiners in turn selling a portion of the resulting corn syrup, necessary to the manufacture of

Shotwell's candies, to Shotwell at ceiling;' that no *net income* resulted from the transactions. Although the law was clear at the time of trial (1953) that Shotwell's over-ceiling expenditures for raw materials could be taken as a deduction against its over-ceiling receipts, it had been the Treasury's position (IT 3724, 1945 Cum. Bul. 57: 1949—1CB6) at the time of the voluntary disclosure (1948) and the indictment (1952), that such expenditures, no matter how well proved, were not deductible.

The Government's star witness at the trial was Lubben. Judge Nordbye[2] found Lubben to be a credible witness but subsequent events and judicial decisions have proved him to be a self-confessed perjurer and a swindler.[3]

1. During 1945 and the first half of 1946 the ceiling price on corn became greatly deranged with respect to that on hogs and farmers, finding it more profitable to use their corn for feed than to sell it at ceiling prices, withdrew it from the open market (R. 2372, 2376 7, 2419 22). The government itself, through the Commodity Credit Corporation, began buying corn at 30c a bushel, over ceiling prices (R. 2420, 2682, 2709, Def. Ex. 74). The candy trade generally found it necessary to engage in over-ceiling "corn deals" in order to get sufficient quantities of corn syrup from the corn refiners (R. 1790). Shotwell has never been accused of being in the black market generally its only over-ceiling sales were to Lubben and for the purpose, so we contend, of getting unrecorded cash which it could spend for unrecorded premiums on corn without alerting O. P. A. inspectors to whom its books were open.

2. Judge Nordbye was specially assigned to the Northern District of Illinois to hear the case because one of respondents is a brother of one of the Northern Illinois District Judges.

3. The District Attorney for the Southern District of New York describes Lubben as follows: "* * * a perjurer and a black marketeer and practically anything else you want to talk about, though I don't know of any income tax violation that he was guilty of. * * * He certainly did not admit any. He certainly admitted many other crimes." (See *Giglio* v. *U. S.*, No. 10 this term, R. 2589.) *In re*

Identification of Persons Involved.

Respondents Cain and Sullivan were large stockholders in Shotwell and were its principal officers. Cain testified at both the suppression hearing and the main hearing; Sullivan at only the latter. Leon Busby, asserted by the motion to remand to have perjured himself, is an independent auditor who regularly audited Shotwell's books and prepared its tax returns; he testified as a defense witness at the suppression hearing, as a government witness at the main hearing. Frank Huebner, a defendant who now wishes to "cooperate" with the Treasury agents, was Shotwell's factory manager and a titular officer; he physically received most of the cash payments of overages which Lubben made; he did not testify. Stanley Gratlund, whose affidavit was filed August 19, 1957, was Shotwell's comptroller; he testified briefly as a defense witness at the suppression hearing, at length as a government witness on the main hearing. Ernest Sauber in 1948 was Chief Deputy Collector of Internal Revenue in Chicago; and subsequently was made Director for the area; he was removed from office on August 6, 1956, after Treasury hearings in which he was accused of wrongdoing in this case (see App. I to Answer to Mo. to Remand) but no finding was made against him in this regard and his removal was ordered on "unrelated charges" (Ftn. 4, Mo. to Rem.); he testified as a government witness at the suppression hearing.

The Facts as to the Voluntary Disclosure.

The essential facts as to the voluntary disclosure are accurately summarized in the Court of Appeals opinion.

Carlsen, 17 N. J. 338, 111 A. 2d 393, shows Lubben in a distillery swindle in Puerto Rico in 1951. *State* v. *Wilcox*, 34 N. J. Super. 267, 112 A. 2d 23, 25, again shows his penchant for perjury.

In sum, the opinion shows that about March 15, 1948 Busby and Cain disclosed the nature of the Shotwell irregularities to Sauber;[4] they were told by Sauber to assemble such data as they could to indicate the transactions and that an agent would be assigned to investigate and substantiate the matter. The record is undisputed that Busby went on a month's vacation and that after his return Cain began complaining that the work was dragging; that ultimately Shotwell personnel were assembled and from the record of sales to Lubben, and other data "recapitulations" of the unrecorded transactions were prepared as an aid to the revenue agent in going about his work. In these sheets, in order to avoid argument, the overages were listed at the amounts it was then believed Lubben, upon inquiry, would claim them to have been (respondents meantime having had access to some of his books), rather than the lower amounts respondents contended were involved."

Although neither side tried, at either the suppression, or the main hearing, to fix the precise date when these recapitulations were finally compiled, it was apparent from the context of the testimony and continuity of events that it necessarily had to be in June or July 1948. Likewise there was, and is, no dispute but that agent Lima was assigned to audit the matter on July 30, 1948 (R. 3173), *solely as a result of respondents' disclosure*; and there was, and is, no dispute but that when agent Lima actually commenced his work he was tendered complete "recapitulations" which listed *every unrecorded transaction with*

4. The disclosure, as permitted by Treasury announcements was oral. ("The simple statement that 'I have filed false tax returns and I want to make the Government whole' *would constitute a complete disclosure.*" Treasury release, May 14, 1947, R. 3136); no one made a memorandum of it; this was agreed to at the hearing (R. 445). Busby and Cain fixed the time as late January 1948, Sauber as about March 15, 1948. The court accepted the latter date.

Lubben. Likewise there was, and is, no dispute that the *only* reason that the Treasury did not make an assessment and close the matter without prosecution was, as the Court of Appeals puts it, that respondents did not turn "informer" and disclose the identity of the recipients of Shotwell's black market payouts, for which "payouts" the Treasury insisted it would allow no deduction.

Against the foregoing background it is now asserted that the Government should have a "new" or "further" trial of the suppression issue because, it is asserted, newly discovered evidence tends to show that the disclosure did not occur until July 1948 and that Busby, Sauber and Cain gave perjurious evidence, of which the record should be "cleansed," when they placed it in the January March 1948 period.

Reduced to lowest terms, the essential logic of the prosecutors' present position is: "We assert that because we now have direct evidence that the explanatory 'schedule or 'recapitulations' of the Lubben transactions were not finally prepared until July 1948, and because Grafund and Hiebner say they did not know about it until about that time, it follows that the disclosure was not made in March." The *non sequitur* is apparent. Moreover, there is nothing "new" about the fact that the recapitulations were not prepared until July.

The 1956 Grand Jury, After an 11 Month Investigation, Refused to Indict Anyone for Perjury in This Disclosure.

The outstanding omission of the "Statement" in the Government's brief is its failure to inform the Court cleanly and squarely that the much vaunted investigation, grand jury and otherwise, on the strength of which the Department of Justice has secured considerable delay in

this Court, *has resulted in no indictment at anytime for perjury with respect to the suppression issues herein.*

The April 1956 Term grand jury for the Northern District of Illinois, Eastern Division, specially impaneled to investigate this case and acting under the guidance of special attorneys dispatched from Washington, returned its indictment on February 27, 1957, two days after this Court had entered its orders which had the effect of denying certiorari. Copy of the indictment appears as an appendix hereto. In lurid, but unspecific terms it makes grave charges against respondents which they deny but which they will have to meet. *However, it does not indict Busby or Sauber for perjury at all; counts Six to Ten are perjury counts against Cain, but these counts go to differences between Cain's testimony and Labbe's on the trial on the merits* — details or items of evidence not material to the question now raised.

Artfully worded footnote 17 to the Government's brief, [fn. 17] "* * * an indictment was returned * * * charging, among other things, that Cain and Sullivan gave perjured testimony at the trial of this case" conceals what it should reveal: that the perjury charged by the grand jury is not material to the pending issues. The refusal of the grand jury to indict Cain or Busby or Sauber for perjury in connection with the disclosure came *after it had heard and evaluated* (as is now shown by the Aug. 21-30, 1956 entry in the "Chronology" attached to the Government brief), *the witnesses Hughes and Gotthard whose truncated affidavits* nevertheless are offered to this Court as prima facie evidence of perjury at the suppression hearing.[5]

5. We are aware that some of the alleged overt acts of the conspiracy count of the indictment come close to allegations of perjury. But the specifying of overt acts is by no means the equivalent of a direct charge or an indictment on the matter covered by the alleged overt act. The telltale distinction is that it is not necessary that all the overt acts charged be proved, or be proved as laid.

SUMMARY OF ARGUMENT.

The motion, although labeled as a mere Motion to Remand, is far more than that: It is a motion by the Government, in a criminal case, for a further, supplemental or new hearing by which it seeks to add new or supplementary evidence to the existing record in an attempt to validate an invalid verdict of "guilty" already obtained. Such a motion is not merely "unusual" as the Government brief confesses, but is unprecedented in the criminal jurisprudence of the country. The Government cannot have a new trial in a criminal case on the ground of newly discovered evidence. To grant such a right would be to defy the wisdom of centuries and open the door for endless, vindictive harassment. The oft-repeated proclamation of perjury in a Government lawyer's brief cannot create the right of a second chance to attempt to convict people, which both the common law and Congress have failed to provide.

If perjury was committed below the Government was not without remedy—it could have procured an indictment therefor. Its inability to get such an indictment makes the present claims of perjury hollow indeed.

The assertion by Government counsel that this is not a case where one party, having failed to convince a court of the soundness of his position, seeks to remand merely to bolster his case by additional evidence, but rather is one where the Government seeks an opportunity to have "excised" from the record respondents' asserted perjury, is wholly specious because the whole thrust of the motion is to add new evidence to the old record and, all else laid aside, the so-called "excision" of *alleged* perjury could not take place in any event unless the testimony was judicially found to be perjury. Decision on such an issue would involve a new trial and a new determination in every sense of the word.

Even if it be assumed that the Government in a criminal case can move for a partial new trial on the ground of newly discovered evidence, it could do so only by meeting the tests uniformly applied in all cases, civil or criminal, where a new trial or new determination is sought on the ground of newly discovered evidence: the movant must show that the evidence could not have been earlier discovered, that he has been diligent, that the evidence goes to a material, controlling point rather than being merely impeaching or affecting credibility, and will probably lead to a different result. The evidence tendered here meets none of these tests nor does the Government brief claim that it does; moreover, it is proffered in support of a theory as to "timeliness" of the disclosure that is legally unsound, and that was specifically disclaimed below.

In any event, if it be assumed that a motion of this kind may be made by the Government in a criminal case, it should be presented to the Court of Appeals rather than to this Court. The Court of Appeals decision not being under review for error, this Court has no independent jurisdiction to set the Court of Appeals mandate aside and send the case back to the District Court.

ARGUMENT.

I.

A PROSECUTOR CANNOT MOVE FOR A PARTIAL NEW TRIAL IN ORDER TO VALIDATE A CONVICTION ALREADY OBTAINED.

Our position that the kind of motion here attempted, even if diligently made and supported by the strongest affidavits, cannot be made by a prosecutor, is set forth in the "Answer to the Motion (Amended) to Remand," p. 13 ff. The Government brief (p. 31) confesses that the "motion is unusual." The confession is a gross understatement: the motion is unprecedented in the criminal jurisprudence of the country. To countenance it would be to open the doors to piecemeal criminal litigation and endless harassments by prosecutors.

We are compelled to investigate new fields: We find no case precisely in point on the facts but several which indicate appropriate correct principles. Although the precise limits of the constitutional prohibition against double jeopardy have never been marked out (Cf. *Palko* v. *Connecticut*, 302 U. S. 319, 322), what is attempted here is probably not a literal violation of the prohibition because the jury verdict was one of guilty. (Cf. *Kepner* v. *U. S.*, 195 U. S. 100, but compare *U. S.* v. *Zisblatt*, 2 Cir., 172 F. 2d 740, certification dismissed, 336 U. S. 934, and *Sapir* v. *U. S.*, 348 U. S. 373.) What is attempted is worse in many aspects than the usual jeopardy case for the prosecutors seek to retain the old guilty verdict through the device of adding to the existing record.

Although the motion is labeled as a mere Motion to Remand, it is far more than that: It is a motion by the Gov

ernment for a new trial of the suppression branch of the case, a branch on which defendants had not asked a new trial in the Court of Appeals and as to which defendants had raised only points of law.

As early as 1799, in the *Case of Vrigs*, Fed. Case No. 5126, it was recognized that the Government cannot have a new trial in a criminal case on good or bad grounds. Rule 33 of the Rules of Criminal Procedure provides only that "the court may grant a new trial to a *defendant* if required in the interests of justice." This is a codification of the established rule that the Government cannot move for a new trial in a criminal case. In *U. S. v. Sanges*, 144 U. S. 310, 312, this Court said:

> "And from the time of Lord Hale to that of *Goldwick's Case*, just cited, the textbooks, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case."

This Court went on to point out that although in some states decisions denying a writ of error to the State after a verdict of acquittal had done so on the grounds that it would constitute double jeopardy, the courts of many states had denied the right upon broader grounds viz. such right does not exist in the absence of statute. This Court further said at page 318, after reviewing many authorities:

> "In many of the States, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the State by positive statute. But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered

ket dealing "at which time Busby displayed surprise and complete ignorance of these transactions." The brief writers have stretched Graflund's language considerably for the affidavit contains only the negative statement that "he [Busby] gave no indication to me that he had known about the matter previously."

Busby testified (as a defense witness at the suppression hearing (R. 170) and as a Government witness on the main hearing (R. 1826-7)), that in early January 1948 Cain sent him and Graflund to New York to investigate Lubben's actual financial position, with respect to a $50,000 loan Lubben was then requesting Shotwell to make him; that on that trip he and Graflund examined Lubben's books and Graflund informed him that over-ceiling payments had been made by Lubben to Shotwell; that promptly upon returning to Chicago he (Busby) brought the matter up with Cain and Sullivan and that this led to the disclosure.

Graflund's affidavit contradicts Busby's testimony that he and Busby talked about the over-ceiling transactions in January 1948, but it does not in any way contradict Busby's, Cain's and Sullivan's material testimony that in any event Busby was fully informed about these transactions by the latter two in January 1948 and was instructed by them to, and did, make the disclosure. The Graflund affidavit therefore cannot rise to the dignity of direct contradiction on the material issue. The most that can be said for it is that it is a contradiction which might tend to impeach the credibility of Busby. That is insufficient as a basis for a new trial.

The inherent weakness of the Graflund affidavit (as well as the Huebner affidavit) is disclosed by the following statement in it: "Prior to this time, *so far as I know,* no work had been done by anyone to assemble records, etc." The brief writers cite no authority for their unstated major premise that alleged absence of knowledge of a fact by one

who need not necessarily have known of it, proves that the fact did not exist.

That Graflund was not taken into the complete confidence of Cain and Sullivan and told everything they were doing is amply shown by the previous record in two ways: *First*, Lubben's financial troubles had started in 1947 and Shotwell had guaranteed a $75,000 bank loan for him. This was a major transaction, yet Graflund had not been consulted or had any connection with it (R. 1757, 1774). *Second*, although sent East with Busby in 1948 to ascertain Lubben's financial condition with respect to the requested $50,000 loan, Graflund had no recollection as to whether he had been told how large a loan it was that Lubben was seeking (R. 1779).

The respondents Cain and Sullivan are men of prominence, pride and reputation in the Chicago area (R. 2686-2705) and were "ashamed" that they were involved in a combined O.P.A. and tax difficulty (R. 2605). There is no reason to suppose they would tell anyone they absolutely did not have to precisely what they were gathering information for.

It is respectfully submitted that if is quite clear that the affidavits of Huebner and Graflund (for all of the prejudicial material inserted in them), do not rise to the dignity of the clear, direct and striking proof on a matter material to the issue under consideration that would warrant a new trial on the ground of newly discovered evidence if presented by a convicted defendant.

This brings us back to counsel's contention that they do not have to meet the tests that a convicted defendant must meet in order to get a new trial on the ground of newly discovered evidence. What reasons do they give? The primary one is set forth at page 37, where they say:

> "A real concern in the usual new evidence case is whether granting a retrial would, in effect, vest

> the power to set aside the conviction, not in the court, but in those proffering the evidence. For example, the courts consider whether such action would enable and encourage defendants to join with prosecution witnesses in automatically setting aside a conviction by production of a 'recantation'. See *People* v. *Shilitano*, 218 N. Y. 161, 169. No such considerations obtain where as here, the newly discovered evidence serves to preserve rather than vitiate the verdict of the jury."

As we understand this passage, counsel say that courts are fearful that if new trials on the grounds of newly discovered evidence were freely granted, the convicted person frequently would intimidate prosecution witnesses and produce "recantations". No such considerations obtain, so they say, when the Government is trying to validate a verdict.

We do not think this asserted "concern," although it well may exist in some cases, is the basic reason why new trials are not readily granted on claims of newly discovered evidence. However, counsel's position ignores the fact that governments, peopled as they are, and always have been, by some functionaries who are over-zealous or over-ambitious, may produce "recantations" or "impeachments" on an issue they lost, by threatening witnesses with seizure of all their world goods through a jeopardy fraud assessment, or by threatening to indict them for crimes. As witness the following questionable chain of events:

In 1952 respondents were indicted on the theory that *Shotwell* received over $400,000 from Lubben. The Shotwell people had never conceded any such figure was true, and in 1951 Cain went to Lubben and asked him to "tell the truth about the barter deals we have had" (deals on which Lubben claimed he had paid cash overages but on which Shotwell contended candy had been made available

at ceiling in exchange for raw material, principally chocolate, at ceiling). Cain's version is at R. 2565, that of Lubben's lawyer Davidson, testifying as a Government witness, is at R. 1326-7, 1336. Lubben insisted he had paid premiums on *all* transactions, *and principally to or through Huebner — that if there was a difference between what Lubben claimed he had paid and Shotwell admitted it received, Cain "ought to have [Huebner] down to the cellar and make him give back the money because he had stolen from his partners"* (Davidson, R. 1336).

It may be, as Lubben's lawyer Davidson claimed in 1951, that Huebner had transactions of some kind with Lubben and put money in his own pocket that the Shotwell executives knew nothing about; that he did, to some extent unknown to them, "steal from his partners," as Lubben claimed. To the degree this may be true, Huebner may owe, or be claimed to owe, very substantial back taxes. If the transactions started as early as 1944, as Huebner's affidavit seems to say and as Lubben claimed, he owes whatever the additional tax may be for that year plus (as of this writing) 50% penalty, plus 72% interest, and so on for successive years. The temptation on a man in such position to dissemble is strong indeed. It does not require much imagination to see what a powerful weapon this situation would provide someone endeavoring to get an affidavit believed to be helpful to the Treasury's case. And no experienced person will believe that Treasury detectives, smarting under the defeat of losing a case, are less dexterous or more timid in using the weapons that come to hand than are detectives the world over.

But, whatever the fact as to that may be, the rule against allowing a new judicial determination on the grounds of newly discovered evidence does not rest on the narrow basis posed by Government counsel, viz., considerations peculiarly applicable to persons convicted of crime. The

upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government."

There is no statute which gives the Government the right to move for a partial new trial in a criminal case on any grounds. The oft repeated proclamation of perjury in a lawyer's brief cannot supply the right of a second chance to try that Congress has failed to give. There is nothing anomalous about such a result. It stems from the fact that our law always has recognized the peril of allowing prosecutors or administrative officials to prosecute endlessly, and that the Government, in a criminal case, has only such rights as are given to it by the common law and the Congress, acting within constitutional limitations.

A defendant in a criminal case has, and rightly so, many rights which the Government does not have. For example, a defendant may appeal to a reviewing court after a conviction, but the Government never can after an acquittal. A supposed criminal by committing perjury may escape punishment for a crime which he committed in fact, but the Government, even though it showed the perjury beyond shadow of a doubt, cannot retry him for the original offense. *U. S.* v. *Ball*, 163 U. S. 662; *Kepner* v. *U. S.*, 195 U. S. 100. It has the right in such a situation to indict and endeavor to convict for perjury. Here, respondents had the right, after judgment of conviction, to urge the reviewing court that the lower court erred in denying the motion to suppress. However, had the trial court in the instant case sustained a motion to suppress, the Government could not have appealed from such an order. (*U. S.* v. *Rosenwasser*, 9 Cir., 145 F. 2d 1015; *U. S.* v. *Janitz*, 3 Cir., 161 F. 2d 19.)

Other examples come to mind: Trial courts may erroneously exclude evidence offered by the Government resulting in the freeing of the defendant by the jury, but the Government is remediless in such a situation and the defendant cannot be retried. Examples might be multiplied, but the foregoing are sufficient to illustrate the point that the Government's rights to a new trial, or to relief from a reviewing court, do not coincide with those of a convicted defendant's.

It is asserted that all that is sought is to "cleanse" the record of what is asserted to be perjury (G. Br., p. 34), but much more is involved: *First*, the prosecutors wish to raise a wholly new timeliness theory, which they disclaimed below (See Answer, p. 19 ff.) and for which no tenable legal theory ever could have been, or is now advanced; *Second*, no simple automatic "striking" or "cleansing" could occur because Sauber, Busby and Cain insist that their testimony was true, and the April 1956 Grand Jury that investigated the case did not find probable cause for accusing them of perjury. Consequently, if the motion was granted, a full new adversary hearing, with rulings as to the materiality and sufficiency of the allegedly "new" evidence; if a material issue developed, the weighing of evidence pro and con (We do not concede that *any* of the proffered evidence is material to show an untimely disclosure under the so-called "Wenchell objective test," Ans. to Mo. to Rem. p. 19 ff.); and a new "determination" (as the prosecutors put it at page 5 of their "Supplement to Motion to Remand") would be required. That is precisely the endless, piecemeal prosecution that is repugnant to our system of justice.

If it was true that Cain or Busby or Sauber perjured themselves in the respects charged, they could have been indicted and, if proved guilty, punished. Justice and purity of the courts (assuming they have been defiled) need not go unavenged; but, as we have seen, the Grand Jury which

investigated this case refused to return perjury indictments of this kind.

Finally, we believe a very practical word may be added. It is well known that the Treasury Department has, at least in recent years, embraced the so-called policy of "relentless prosecution" in criminal cases; has accepted the theory that it is in the interests of the collection of the revenue to overlook potential cases in which it believes there is a doubt as to whether a conviction is obtainable, but to prosecute "relentlessly" those in which it believes it will obtain convictions. The supposed advantage of this policy is that it tends to make the mere threat of a criminal case a weapon of terror and potency in securing taxes. The wisdom of that policy, of course, is a question to be determined in Executive, and not in Judicial, circles. But when administrators attempt to carry that policy of never losing to the point where the established safeguards of judicial procedures are sought to be set at naught, as is here the case, they are beyond their province and must be checked by the courts.

And if it should be that all the criminal litigation against these respondents should evaporate, the revenue would still not be in danger, for the Government has ample means under the civil laws to collect the tax, *if any*, that may be owing, and presumably to do so with penalties, and certainly with interest.

II.

THE LEGAL THEORY OF THE MOTION, VIZ., THAT THE DISCLOSURE WAS NOT TIMELY, IS INCORRECT, WAS CONCEDED TO BE ERRONEOUS IN THE DISTRICT COURT, AND NEVER WAS PRESENTED TO THE COURT OF APPEALS.

In the confusion of the various briefs and the varying theories that have been offered by successive Government

counsel, the following salient and indisputable facts must not be lost sight of:

Respondents, whether in January-February 1948 as they contend, or in July 1948 as the prosecutors now contend, did in fact make a disclosure (a) to a proper official of the Bureau of Internal Revenue; (b) of all of their transactions with Lubben; (c) before the Treasury had initiated any independent investigation of Shotwell, and (d) this disclosure led to the assigning of a Treasury agent (Joseph Lima) on July 31, 1948 (R. 3173) to audit the accounts with the aid of "recapitulations" furnished him by respondents, which listed every single transaction that has since been called into question; and (e) the only reason ever assigned for dishonoring the promise of immunity was that respondents would not "inform" on the recipients of their payouts.

These facts were made clear in our Answer to the Motion (Amended) to Remand (see pages 5 and 6, footnote 3, pages 19-24). They have not been, and cannot be gainsaid. The present brief for the United States does not do so and does not point out any theory which would make this disclosure untimely.

Instead of stating and defending a specific theory of "untimeliness", instead of attempting to show that the treasury ever did initiate an investigation of Shotwell independent of that flowing from the disclosure (it cannot), the brief endeavors to slide around the point by stating that "this is not the proper forum to pass, in the first instance, on this and other aspects of the timeliness issue." But the matter is not that simple. The question is whether at this remote stage of the case the prosecutors can inject a new timeliness issue or theory, and whether the issue or theory they seek to inject is even *prima facie* sound.

The timeliness theory expressed for the first time in the

Motion to Remand, which the brief does not now attempt to support, was that since the New York Revenue Office, *in the course of investigating Lubben*, asked a Chicago agent on June 21, 1948 to verify some of Lubben's transactions from Shotwell records, that the Revenue Service received a "clue" that *might* have led to Shotwell (it did not), and hence a disclosure, assuming it occurred after the receipt of such "clue", would be untimely. But this is all factually, as well as legally, unsupportable:

The facts shown by the Revenue Agent Krane's own report appearing at record 3166-7 are simply that on June 21, 1948, New York agents, investigating Lubben, requested Chicago agent Krane to verify or check information *on Lubben* by obtaining certain invoices and other data from Shotwell. Krane did this. His report of July 1, 1948, prepared for transmission to New York, appears at R. 3161 ff. *Nothing further happened with respect to Shotwell as a result of this June 21, 1948 call.*

Krane's report of August 30, 1950 (R. 3166 ff.) also shows that on August 20, 1948, Close & Co. of Chicago, another candy manufacturer which had dealt with Lubben, made a disclosure that came to the attention of Intelligence agents in Chicago. On August 31, 1948, Intelligence officers of the Chicago office wrote to the New York Intelligence Office suggesting that possibly Shotwell had received over-invoice payments from Lubben similar to those Close & Co. had received. The Chicago Office requested the New York Office to make appropriate inquiries of Lubben. The New York Office replied on September 13 *that it was informed that Shotwell had made a disclosure* to the Revenue Agents' Office in Chicago. The Chicago Intelligence Agents then inquired of their brothers in the Revenue Agents' Office and found out that Lima was already conducting his examination.

The theory that merely getting a *clue* (at whatever date),

in the course of investigating Lubben that might ultimately have led to an investigation of Shotwell-marked the "initiation of investigation" of Shotwell was specifically and properly disclaimed by the Department of Justice in the District Court (R. 441, 445) and could not be raised here (*Helvering v. Minnesota Tea Co.*, 296 U. S. 378, 380) even if it was legally sound—which it plainly is not.

"Timeliness" of a voluntary disclosure, *i. e.*, whether it was made before investigation had been "initiated", is determined by the so-called "Wenchel objective test" for determining "initiation of investigation" which is:

> "*An investigation is initiated when a special agent, an internal revenue agent, a deputy collector, or other Bureau officer, is assigned a return for examination, or when an investigating officer has requested advice of appropriate officers of the Bureau with respect to the filing of a return or the payment of taxes.*" (Treasury release, May 14, 1947, R. 3132-3136.)

The theory advanced in the trial court was that the "timeliness date" was December 16, 1947 when, so it was first asserted, the Shotwell return was assigned for "audit" in the Chicago office. However, the proof showed without dispute that the return was *not* then assigned for "audit" but merely routinely assigned for "survey" as to whether it should be audited (R. 393-6). The December 16, 1947 theory has long since disappeared.

There is no dispute about these facts and they lead inevitably to the conclusion that the disclosure, whether in early 1948 as respondents contend, or in July 1948 as the prosecutors now contend, was timely. The *only investigation of Shotwell's affairs that was undertaken flowed from the disclosure and no independent investigation ever was undertaken.* No step inconsistent with full recognition of a valid disclosure was taken until September 1950 when the Intelligence Unit requested that "a case jacket be

issued" simply because Shotwell's officers "refused" to identify the recipients of the over-ceiling disbursements for which the Treasury insisted then and for some years thereafter it would allow no deduction (R. 3172).

III.

IF IT BE ASSUMED THAT THE GOVERNMENT CAN MOVE FOR A PARTIAL NEW TRIAL, THE SHOWING IN SUPPORT OF THE MOTION SO UTTERLY FAILS TO MEET APPLICABLE TESTS THAT IT MUST BE DENIED.

Government counsel appreciate that the showing that they have made in support of the motion, if tested by the rules applicable to a motion by a convicted defendant for a new trial on the grounds of newly discovered evidence, is so utterly inadequate that it would be denied out of hand. Therefore, they claim that it does not have to meet those tests, saying:

> "Contrary to respondents' assertion (Answer 13-16) the Government is not seeking a new trial, and authorities with respect to the granting of retrials on the grounds of newly discovered evidence have no application here. The considerations which are relevant when a defendant seeks to have a verdict set aside because of new evidence tending to negate guilt are entirely inapposite here. In this case, the newly discovered evidence supports the conviction—which was set aside by the Court of Appeals—and all of the perjury adduced below was in support of a defense contention which was accepted by the Court of Appeals." (Br. 36.)

Counsel never do say what kind of a showing must be made in support of a motion such as theirs, but, judging by the showing actually made, it entails no more than reiterating frequently the charge of perjury and adducing of affidavits tending to impeach the testimony of witnesses who testified to a non-decisive occurrence or a few of the details relating to it.

To put the matter another way: counsel are contending for a double standard. The Government, so they say, which is attempting to send citizens to the penitentiary in violation of their constitutional rights (according to the Court of Appeals), has to make some undefined, but lesser showing than a citizen who is trying to escape the penitentiary on the grounds that newly discovered evidence will show he was innocent.

The mere statement of that evil proposition contains its self-refutation. The fact that a convicted defendant is trying to upset a jury verdict while the Government is here trying to hang onto one, to which counsel attribute such legal significance, is legally irrelevant.

The leading case as to when a defendant may secure a new trial on the ground of newly discovered evidence is *U. S. v. Johnson*, 7 Cir., 142 F. 2d 588, which collects many authorities and in which Judge Minton said at p. 592:

> "Having decided that there was no recantation or false swearing by Goldstein, the District Court then considered the case as any other motion for a new trial on newly discovered evidence would be considered. On such consideration, the court found that the rule for such motions 'has never been better nor more succinctly stated than' in *Berry v. State of Georgia*, 10 Ga. 511, which he quoted as follows:
>
> "'Upon the following points there seems to be a pretty general concurrence of authority, viz: that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3rd. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.:—speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for.

> And 6th, a new trial will not be granted, *if the only object of the testimony is to impeach the character or credit of a witness.*" (Italics added.)

Here the only avowed object of the so-called newly discovered evidence is merely to impeach a part of Busby's testimony, and perhaps that as to Cain, as to certain facts not directly, but perhaps circumstantially, militating against their testimony as to when the disclosure was made.

The Government does not pretend there has been any change or recantation by any of the three participants to the disclosure; nor that it has direct evidence that the disclosure was not made when the participants say it was. The brief on the contrary with its extravagant charges of perjury, relies almost exclusively on the affidavits of Huebner and Graflund. That these affidavits contain nothing warranting a vacation of the Court of Appeals judgment and a remand of the case we now show:

The "Supplement to Motion to Remand" asserts (p. 4) only that Huebner will testify on three points.

(1) That Lubben made over-ceiling payments from November, 1944, to December, 1946, rather than from September, 1945, to June, 1946, as defendants asserted. This goes solely to the merits of the case. This question was in no way involved in the suppression hearing. It has no bearing on the timeliness of the disclosure, and therefore may be disregarded.

(2) That during the first six months of 1948 no one "mentioned" to Huebner (Suppl. p. 8) that a disclosure had been made; that in July, 1948, he was at the meeting with Shotwell staff people in the Belden-Stratford Hotel at which the recapitulations were prepared "so that a disclosure could be made"; that prior to this, "so far as he knows," no work was done by anyone relative to compiling data "*for the purpose of making a voluntary disclosure*";

that *he was "given to understand"* the date would be set at June 15, 1948. It is said (Suppl. p. 4) that this contradicts suppression testimony by auditor Busby that Huebner was at a meeting in late January at which it was decided to make a disclosure, and by Cain that Huebner "possibly" was there.[6] And it does. But it does not contradict the testimony of Busby, Cain and Sauber that the disclosure in fact was made in the January-March period, that Sauber told them to assemble figures to assist the agents who would make an audit or investigation (R. 178, 182, 232), that this work "dragged" and that finally Cain assembled the staff and got the job done (R. 323).

Neither Busby nor Cain in lengthy testimony as to the events leading up to the disclosure and as to the work done in assembling figures thereafter, mentioned Huebner as playing any part until the staff met to assist in putting together the final recapitulations, except that Busby gave a single answer (R. 176) that Huebner was present when Cain made the decision to disclose, while Cain at one point said Huebner "possibly" was (R. 228-9) and at another excluded him (R. 249). In fact however, Huebner, even according to Government witness Davidson (R. 1315 ff.), had been sent as a messenger to Lubben in February 1948 to get, *and he got*, some of Lubben's records to take to Chicago "to correct or conform the Shotwell books, because they had no—there were some entries missing on their books" (R. 1321).[7]

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6. It may be noted that at one point Cain said Huebner was "possibly" there (R. 228-9); at another he identified only himself and Sullivan as being at this particular session with Busby (R. 249). This is indicative of the fact that the witnesses were endeavoring, within the limits of memory, to give honest testimony—it is indicative also of the unimportance or immateriality of this particular meeting to the issues that were being tried.

7. It will be noted this is strong corroboration of the fact that the disclosure had been made in January and that

In any event, out of many meetings between these people on many subjects in this period involving not merely taxes, but a loan Lubben was requesting any one of the three could be mistaken. Busby's and Cain's testimony as to who was present at this particular meeting was as to an immaterial point. The fact that Huebner's present alleged recollection differs from theirs as to this particular gathering is still a difference as to an immaterial point, and certainly does not show perjury by Busby or Cain or, for that matter, by Huebner. Huebner's affidavit that "no one mentioned to him" that a disclosure had been made plainly does not contradict evidence that one had been made. In neither law nor fact does the president of a corporation (Cain) always tell a plant manager (Huebner) everything he has done.

The affidavit discloses that someone has drilled into Huebner the notion that a disclosure could be made only by presenting a document containing corrected figures. Thus, he says that the recapitulations were made "*so that*" a disclosure could be made. The fact that the disclosure *per se* consisted merely of coming forth and identifying one's self as having filed an improper return, that the Treasury always reserved the right to make its own investigation in verification of the disclosure, and that assistance by the taxpayer in making a correct return was at most in

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the work of assembling data, as suggested by Sauber, started soon thereafter; moreover, it casts grave doubts on the verity of Huebner's affidavit that he didn't hear of the disclosure until July, 1948. It will be recalled that Shotwell's books showed no "overages", while Lubben's, whether correct as to rates and amounts, did show them, at least for some of the periods for which Lubben's books were in existence. The information obtained in this manner, supplemented by memories and other data, was incorporated in the "recapitulations" furnished to the examining agents (R. 2814-5; see also Def. Suppr. Ex. 2, 3097 ff., particularly the columns headed "Memo Taken from Luben (*sic*) Record.").

the nature of a condition subsequent to the disclosure (Cf. Answer to Motion to Remand, pp. 28-29; see also footnote 2 thereof, p. 3), is one that has escaped Mr. Hudner and the prosecutors from who he apparently is taking his legal advice. But, "The simple statement that 'I have filed false tax returns and i want to make the Government whole', would constitute a complete disclosure." (Treasury Release, May 14, 1947, R. 3136.)

(3) That sometime in the late summer or early fall of 1948 Cain and Busby told Huebner the case had been "fixed" for a tax deficiency of $20,000, but that someone destroyed the settlement papers. While this carries overtones of wrongdoing, it has nothing to do with the disclosure question because, admittedly, agent Lima was assigned on July 30, 1948 (Dft. Ex. 15, at R. 3173, R. 321), to investigate or audit the company *pursuant to the disclosure* and had gone to work on the case.

Of the three items of asserted Huebner proof, on which the Supplement claims the case should be reopened, items (1) and (3), disparaging as they may be, obviously have no relevancy to the disclosure timeliness issue that is pressed as the reason for reopening. Item (2), while connected with the disclosure events, is not material to the issue and could not support a motion for a new trial. New evidence that might warrant a new trial (assuming the Government could move for one), would have to be in direct contradiction of something originally given at the suppression hearing that was vital to a decision of the issue. The irrelevant matter loaded into the affidavit may, or may not, be material to the new conspiracy indictment. But that is not this case, nor is that the issue before the Court.

With respect to Graflund, the brief states that if the case is remanded he will testify that it was not until June 1948, that he related to Busby what he knew about the black mar-

rules in criminal cases which are applicable to convicted defendants merely embody a policy against piecemeal and endless litigation which is found in every type of judicial proceeding, criminal or civil, jury or nonjury. And every litigant, be he a private person or the Government, who seeks a new judicial determination on the grounds of newly discovered evidence, *must meet substantially the same tests which a person convicted of crime must meet:*

Moore's Federal Practice (2d Ed.), Vol. 6, p. 3785, says with reference to a civil jury case:

> "To warrant a new trial the evidence must not have been known to the movant at the time of the trial; and moreover, the movant must have been excusably ignorant of the facts, *i. e.*, the evidence must be such that it was not discoverable by diligent search."

At p. 3787:

> "In general, a new trial is not warranted unless the evidence, if it had been presented at the former trial, would probably have produced a different result. Evidence, therefore, that is merely cumulative or whose only effect is to contradict or attack the credibility of witnesses will ordinarily not warrant a new trial, in the absence of very unusual or extraordinary circumstances."

The author further points out that the same rules prevail where one seeks a new trial on this ground in a nonjury civil case (Vol. 6, p. 3771, note 13).

In *Marshall's U. S. Auto Supply* v. *Cashman*, 10 Cir., 111 F. 2d 140, 142, the Court said:

> "A motion for new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial, must show facts from which the Court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that it is of such char-

> acter that on a new trial such evidence will probably produce a different result."

In *Brown* v. *Schwartz*, 5 Cir., 164 F. 2d 151, 152, the Court said:

> "She [the Appellee] invokes the settled rules of state and federal courts alike; * * * (2) that a motion for a new trial on the ground of newly discovered evidence may not be granted unless (a) the facts discovered are of such nature that they will probably change the result if a new trial is granted; (b) they must have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier; (c) they are *not* merely *cumulative* or *impeaching*."

In discussing the claim for a new trial on the grounds of perjury committed on behalf of the prevailing party, the Court, in *Glade* v. *Allied Electric Products*, 7 Cir., 135 F. 2d 590, said at p. 591:

> "It certainly cannot be said as a matter of law that a new trial ought to be granted whenever an affidavit is made that testimony used against the losing party at the trial or in a related proceeding was perjured, for the mischief of endless litigation would far outweigh any advantage which would be gained thereby."

Other authorities to the same effect might be multiplied. But the foregoing are sufficient to dispel any notion that only persons convicted of crime are subject to stringent rules when they seek a new trial on the ground of newly discovered evidence. The rule is substantially the same whenever a party seeks a new determination, whether it be by a jury or by a court.

Certainly, a seriously injured plaintiff, for example, who has lost his claim because of alleged perjury on the part of the defendant, who seeks a new trial on the ground of new evidence, should meet with as warm, if not a more sympathetic response from the Court than should

the prosecuting arm of the Government, which is making the same type of claim in an effort to send people to the penitentiary. The same can be said of an alleged patent infringer where the patentee has obtained a finding of invention from the Court on testimony allegedly perjured.

A claim for a new judicial determination on the basis of newly discovered evidence is a disfavored one in whatever branch of litigation it is made. The claim of "perjury", and others of a similar nature, are so frequently advanced by losing litigants that they are always viewed with suspicion. There must be an end to litigation sometime, and this is even more true in a criminal case where liberty is at stake than in most others.

This policy has peculiar application here, in view of the fact that this case has already been pending in this Court for over two years while the Government has leisurely investigated and reinvestigated, and has been able to come up with nothing better than questionable evidence perhaps tending to impeach a small part of the testimony of one of the participants in the disclosure.

There is a final observation with respect to counsel's effort to escape the established and salutary rules with respect to granting new trials, or new determinations, on grounds of newly discovered evidence, that merits consideration because its utter speciousness betrays the incurable weakness of the motion. The Government's brief states (p. 37):

> "Moreover, this is clearly not a case where one party, having failed to convince a court of the soundness of this position, seeks to remand merely to bolster his case by additional evidence. Rather, what the Government in essence seeks here is an opportunity to have excised from the record respondents' perjury."

If excising so-called "perjury" from the record in a trial

court in order to reobtain or reaffirm the order (denying suppression) already entered in that court, and which it is hoped will pass review after the "excision", is not bolstering one's case, then there is no such thing. One's case may be "bolstered" by affirmatively adding to one's own evidence or by taking away or detracting from that of one's opponent.

Let there be no mistake: all that is sought is a chance for the prosecution to hang on to a trial court conviction and to bolster a record that was not good enough to sustain it—a record on which certiorari has been denied.

Counsel's protests that they are not seeking to bolster their case by additional evidence serves only to emphasize that that is precisely what they are trying to do. Indeed, their brief (p. 27 ff.) asserts that if the motion is granted, Huebner, who did not testify at all, will now testify thus and so; that Graflund, who testified but briefly (R. 383-389), will now testify as to such and such additional facts; that Agent Lima, who testified but briefly (R. 319-26), will now testify to such and such additional facts. Logic simply will not tolerate the false excuse that because the Government is not seeking to bolster its case by additional evidence it may be excused from the usual rules pertaining to motions for a new trial (assuming *arguendo* it can make such a motion at all).

For counsel to assert, as they do (pp. 27-30), that if the motion is granted they will produce certain additional evidence, and to deny on page 37 that they are seeking to bolster their record with additional evidence, gives away their whole argument.

In this same vein the suggestion is made (Br. p. 34) that, since respondents had the burden of proof on the motion to suppress, the Government would clearly prevail on the supposed new hearing if not more were to occur there than striking from the record the testimony as to the time

of disclosure, if it is found to be perjurious. But "striking from the record" or "excising" testimony does not occur automatically. What would be involved would be a whole new trial of the issue as to suppression, with witnesses examined and cross-examined as to whether Busby, for example, was correct when he said Graflund discussed the over-ceiling payments with him on the New York trip in January, 1948, or whether Graflund was correct in saying that the first discussion did not occur until in June, etc., etc. This is far from an automatic obliteration of testimony. It is putting in "bolstering" evidence to overcome evidence already in the record.

We respectfully suggest that the counsel would not go to such extreme lengths in attempting to minimize what they are asking for if they could truly defend it. They clearly are seeking a new trial, or a new determination, in the broadest sense of the word on both legal and factual issues. That is a thing that never has been permitted and, if it ever is permitted, will open the door for executive and administrative tyranny.

IV.

THE GOVERNMENT HAS NOT BEEN DILIGENT.

One of the hornbook requirements for a new trial on the grounds of newly discovered evidence is that the evidence should not have been previously discoverable and should have been diligently sought and diligently presented. Apply this to the present contention that the motion should be granted because of supposedly newly discovered evidence to be given by Huebner, Graflund and Revenue Agent Lima.

Huebner was a defendant; we will concede that his evidence was not available to the prosecutors in 1952. But Graflund was not a defendant and was not in the

employ of the Shotwell Company in either 1952 or 1953. He was available to the Government and was interviewed and examined. Revenue Agent Lima was at the beck and call of the Treasury at all times. It is little short of farcical to say that the evidence of these people was not available and could not have been produced.

In our "Reply to Supplement to Motion to Remand" we asserted that the Department of Justice, rather than being diligent and frank, had been playing cat and mouse with the defendants and with the court (p. 10). We suggest that everything there said is borne out by what has now occurred:

The chronology attached to the brief shows that Huebner and Graflund testified before the 1956 Grand Jury on August 21 to 30, 1956, and that a "series of conferences with Government attorneys continued"; that Graflund again testified before the Grand Jury on February 20, 1957. Nevertheless, the motion was first presented on the wholly improper hearsay affidavits of lawyers and Treasury operatives. The Huebner affidavit was not presented until January 9, 1957; the Graflund affidavit not until August 19, 1957. It is obvious that the affidavits could have been presented at any time after the first of September, 1956. An affidavit from agent Lima could have been produced at any time, but such has not *yet* been done. Instead we find the first reference to Lima is the naked assertion of counsel in their present brief that if a new trial is granted Lima will testify thus and so.

Such tactics should not be tolerated and would not be tolerated by the Department if they were indulged in by a citizen seeking to void a conviction. No private litigant who seeks a new determination on the ground of newly discovered evidence is allowed to harbor evidence for months and years and then claim it as newly discovered. Yet that is what has occurred here.

V.

IF A MOTION OF THE KIND MADE CAN BE MADE AT ALL, IT SHOULD BE MADE IN THE COURT OF APPEALS AND NOT HERE.

On February 27, 1957, this Court refused to review the case on anything raised by the petition for certiorari. The motion to remand, although filed while the petition for certiorari was pending, is independent of it and now stands alone.

Counsel assert that jurisdiction exists under 28 U. S. C., Par. 2106, which, of course, does give this Court, or a Court of Appeals, authority to remand causes, but that section is conditioned and dependent upon the fact that the case be before the court "for review."

We think the matter is governed by *Realty Acceptance Co.* v. *Montgomery*, 284 U. S. 547, decided under Section 701 of the Revised Statutes, the predecessor statute of 28 U. S. C., Par. 2106, and identical with it in all material respects. *Realty Acceptance* pertains to the power of a Court of Appeals rather than of this Court but that fact makes no difference because Par. 2106 applies without distinction to "the Supreme Court or any other court of appellate jurisdiction." The holding is summarized in headnote 3, which reads:

> "Section 701 of the Revised Statutes, providing that this Court may affirm, modify or reverse judgments of federal courts brought before it for review * * *, or may direct * * * such further proceedings to be had, by the inferior court, as justice may require, which section was made applicable to the Circuit Court of Appeals * * * does not authorize a Circuit Court of Appeals to reverse a judgment at law in which it has found no error upon the record, and to remand the case to the District Court in order that that court may reopen it after expiration of the term at which such judgment was rendered, for the purpose of hearing new evidence."

The *Realty Acceptance* case involved a question as to expiration of the term of the lower court which, of course, is no longer of importance under the virtual abolition of the old time term distinctions. But that is of no consequence on the major proposition involved here, which is whether a reviewing court (here this Court), which does not have a case before it for review, nevertheless is given authority by Par. 2106 to remand the case for new evidence. On that question *Realty Acceptance* v. *Montgomery* is, we believe, decisive. Note Justice Roberts' language at page 551, where, after reviewing several cases, he says:

> "* * * Nothing was there said to indicate that this court would order further proceedings below to attack or set aside a judgment entered on a record which disclosed no error calling for a modification or reversal. No authority is cited in which R. S. 701 has been construed as extending this court's powers in the manner for which petitioner contends."

It is established practice that motions on grounds of evidence theoretically discovered after a Court of Appeals decision must go initially to that court for a determination as to whether there is a *prima facie* showing that warrants a change in that court's mandate. See *U. S. v. Johnson*, 7 Cir., 142 F. 2d 588, 589, reciting action of this Court sending the case back to the Court of Appeals while it was pending upon an application for certiorari here; see also recitals in this Court's subsequent opinion in the same case at 327 U. S. 106.

We cannot escape the conclusion that the Department of Justice, being dissatisfied with its treatment by the Seventh Court of Appeals, is engaging in a polite and sophisticated form of forum shopping, and perhaps entertains the hope that this Court, not presently as familiar with the record as is the Court of Appeals, will give the Department's protestations of "material new evidence" more weight than it fears they would be given by the Court of Appeals.

CONCLUSION.

It is respectfully requested that the motion to remand be denied.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
HOWARD ELLIS,
WILLIAM T. KIRBY,
Counsel for Respondents-Cross-Petitioners The Shotwell Manufacturing Company, Byron A. Cain and Harold E. Sullivan.

WINSTON, STRAWN, SMITH & PATTERSON,
38 S. Dearborn Street,
Chicago, Illinois,

KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
130 E. Randolph Drive,
Chicago, Illinois,
Of Counsel.

September 25, 1957.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* HAROLD E. SULLIVAN, BYRON A. CAIN, LEON J. BUSBY, ERNEST J. SAUBER, and RALPH R. JOHNSON, *Defendants*.	No. 57 CR 149.

INDICTMENT RETURNED BY GRAND JURY, FEBRUARY 27, 1957.

COUNT ONE.

The Grand Jury charges:

1. That from on or about June 21, 1948, and continuously and at all times thereafter up to and including the date of this indictment Harold E. Sullivan, Byron A. Cain, Leon J. Busby, Ernest J. Sauber and Ralph R. Johnson, hereinafter referred to as defendants, in the Northern District of Illinois, Eastern Division, and elsewhere, did willfully and unlawfully conspire, combine, confederate and agree together, each with the other, and with the Homan Mfg. Co., Inc., formerly The Shotwell Mfg. Co. (hereinafter referred to as Shotwell), Frank J. Huebner and Patrick J. Grace,

Jr., and with divers other persons to the Grand Jury unknown, all of which persons, named and unknown, other than the defendants themselves, will hereinafter be referred to as co-conspirators, said co-conspirators being not named as defendants or indicted herein:

(A) To defraud the United States of America of income taxes due and owing to it by defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner for the calendar years 1944, 1945, and 1946, by concealing, causing the concealment of, and continuing to conceal from officers and employees of the United States, including officers and employees of the Bureau of Internal Revenue and the Internal Revenue Service of the United States Treasury Department (said Bureau and Service hereinafter referred to as the Internal Revenue Service), the receipt, utilization and disposition of taxable income by defendants Harold E. Sullivan and Byron A. Cain and co-conpirators Shotwell and Frank J. Huebner during the years 1944, 1945, and 1946, in connection with transactions had during said years by co-conspirator Shotwell with one David G. Lubben, the Eatsum Food Products Co., a sole proprietorship, the Eatsum Food Products Co., a partnership, General Confections, Inc., a corporation, and its wholly owned subsidiary, Reserve Trading Co.

(B) To defraud the United States of and concerning:

(1) The exercise of its governmental function and right of ascertaining, computing, levying, assessing, and collecting taxes due and owing to the United States of America for the calendar years 1944, 1945, and 1946 by defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner, respectively, and of the investigating, detecting and prosecuting violations of the internal revenue laws of the United States, free from bribery, unlawful impairment, obstruction, improper influence, bias,

dishonesty, false statements, misrepresentations, concealment, deceit, fraud and corruption;

(2) Its right to and interest in the conscientious, faithful, disinterested, unbiased and honest services, judgments, determinations and actions of defendants Ernest J. Sauber and Ralph R. Johnson, duly appointed employees of the Internal Revenue Service, concerning matters affecting and pending in and before the Internal Revenue Service, and to have such services, judgments, determinations and actions exercised free from bribery, corruption, dishonesty, improper influence, bias, partiality, and fraud;

(3) Its governmental function and right to have the business and affairs of the Internal Revenue Service, in the consideration, administration and disposition of matters affecting and pending in and before the Internal Revenue Service, conducted on its behalf fairly, honestly, and free from fraud, deceit, improper influence, partiality, concealment, interference, obstruction and corruption;

(4) The exercise of its governmental function and right of administering justice in the United States District Court for the Northern District of Illinois, Eastern Division, and of punishing violators of the internal revenue laws of the United States, free from interference, obstruction and impairment through the giving of false, fictitious, and fraudulent testimony before the said Court and before Grand Juries of the said Court.

(C) To commit certain offenses against the United States, to wit:

(1) The crime of willfully attempting to evade and defeat a large part of the taxes due and owing to the United States of America by co-conspirator Shotwell for the calendar years 1944, 1945, and 1946, in violation of Title 26, United States Code (I. R. C. 1939), Section 145(b);

(2) The crime of willfully attempting to evade and defeat a large part of the income taxes due and owing to the United States of America by defendants Harold E. Sullivan and Byron A. Cain and co-conspirator Frank J. Huebner, respectively, for the calendar years 1944, 1945, and 1946, in violation of Title 26, United States Code (I. R. C. 1939), Section 145(b);

(3) The crime of bribery in violation of Title 18, United States Code, Section 201;

(4) The crime of knowingly and willfully making and causing to be made false, fictitious and fraudulent statements and representations in matters within the jurisdiction of agencies of the United States, to wit, the Internal Revenue Service and the United States Department of Justice, in violation of Title 18, Section 80, United States Code (1946 Ed.); 18 U. S. C. 1001;

(5) The crime of perjury in violation of Title 18, United States Code, Section 1621;

(6) The crime of obstruction of justice in violation of Title 18, United States Code, Section 1503;

(7) The crime of violating Title 26, United States Code (I. R. C. 1939), Section 3793(b); and

(8) The crime of violating Title 26, United States Code (I. R. C. 1939), Section 4047(c) (3), (5) and (6).

The Grand Jury further charges that said unlawful conspiracy, combination, confederation and agreement was to be accomplished by the means and method and in the manner following:

1. During the course of the conspiracy The Shotwell Mfg. Co., which became the Homan Mfg. Co., Inc., on or about May 15, 1952, was a corporation organized and existing under the laws of the State of Illinois. During the course of the conspiracy defendant Byron A. Cain was

President and Treasurer of The Shotwell Mfg. Co. and its successor, the Homan Mfg. Co., Inc.; defendant Harold E. Sullivan was attorney for and Executive Vice-president of the said corporation; defendant Leon J. Busby was a practicing certified public accountant; defendant Ernest J. Sauber was successively Chief Field Deputy in the office of the Collector of Internal Revenue, Chicago, Illinois, Assistant Collector of Internal Revenue, Chicago, Illinois, and District Director of Internal Revenue, Chicago, Illinois; defendant Ralph R. Johnson was successively a Group Supervisor in the office of the Internal Revenue Agent in Charge and in the Audit Division, Internal Revenue Service, Chicago, Illinois, and Chief of the Field Audit Branch, Audit Division, Chicago District Office, Internal Revenue Service, Chicago, Illinois; co-conspirator Frank J. Huebner was Vice-president of The Shotwell Mfg. Co.; and co-conspirator Patrick J. Grace, Jr. (now deceased), was a practicing attorney in Brooklyn, New York.

2. During the course of the conspiracy there were pending in the Internal Revenue Service and the United States Department of Justice income tax investigations, matters and proceedings concerning defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner. During the course of the conspiracy there was pending in the United States District Court, Northern District of Illinois, Eastern Division, an indictment charging The Shotwell Mfg. Co., Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner as defendants with willfully and knowingly attempting to defeat and evade a large part of the taxes due and owing by The Shotwell Mfg. Co. to the United States of America for the calendar years 1945 and 1946. During the course of the conspiracy the April 1956 Term Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, a competent tribunal, instituted an inquiry and investigation into

possible violations of the internal revenue laws and other criminal laws of the United States in said district, and into possible violations of laws concerning the administration of the internal revenue laws and the administration of the affairs of the Internal Revenue Service in said district. Said inquiry and investigation was a case in which a law of the United States authorized an oath to be administered.

3. It was a part of the conspiracy that defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner, having willfully attempted to evade and defeat large amounts of corporation taxes and individual income taxes, due and owing to the United States by said defendants and co-conspirators for the calendar years 1944, 1945, and 1946, would nevertheless escape the payment of a substantial amount of said taxes due and owing to the United States, and would escape indictment, and if indicted, would escape prosecution.

4. It was a part of the conspiracy that the defendants and co-conspirators would conceal, cause to conceal, and would make continuing efforts to conceal from the Internal Revenue Service, the United States Department or Justice, the United States District Court for the Northern District of Illinois, Eastern Division, and Grand Juries of said Court, that defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner received large amounts of unrecorded and unreported income during the years 1944, 1945, and 1946, and that they each owed the United States large amounts of tax for said years, by virtue of over-invoice premium payments in currency and other payments received in currency on certain sales of merchandise by co-conspirator Shotwell during the said years. It was further a part of the conspiracy that the said concealment and efforts to conceal were to be aided and accomplished by various means, in-

cluding, but not limited to, bribery, obstruction of justice, the making of and causing to be made false and fraudulent statements and representations to the Internal Revenue Service, the submission of and causing to be submitted false and fraudulent papers and documents to the Internal Revenue Service, the inducement of others to make false statements and representations to the Internal Revenue Service, the concealment and destruction of books and records, the obstruction, impeding and thwarting of investigations, inquiries and proceedings of the Internal Revenue Service, attempts to terminate and suspend investigations and inquiries being conducted by the Internal Revenue Service, attempts to influence, impede and obstruct witnesses and potential witnesses, and the giving of and causing to be given false, fictitious, and fraudulent testimony and representations to the United States District Court for the Northern District of Illinois, Eastern Division.

5. It was a part of the conspiracy that the defendants and co-conspirators would make and cause to be made false and fraudulent statements and representations to the Internal Revenue Service, the United States Department of Justice, the United States District Court for the Northern District of Illinois, Eastern Division, and Grand Juries of said Court, concerning an alleged voluntary disclosure purportedly made to the Internal Revenue Service in 1948 by or on behalf of co-conspirator Shotwell.

6. It was a part of the conspiracy that the defendants and co-conspirators would attempt corruptly to obtain a settlement of tax cases concerning co-conspirator Shotwell for the years 1944, 1945, and 1946 at a figure greatly below the amount of tax due and owing to the United States by said Shotwell, although such action would result in the defeat and evasion of a large amount of taxes due and owing the United States for said years by defendants Harold E.

Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner.

7. It was a part of the conspiracy that defendant Ralph R. Johnson, in violation of his lawful duties as an employee of the Internal Revenue Service, would corruptly take actions and render decisions with respect to investigations, matters and proceedings pending in and before the Internal Revenue Service, and would aid in committing fraud and would allow fraud to be committed on the United States by the other defendants and co-conspirators.

8. It was known to the defendants and co-conspirators from the inception of the conspiracy that investigations of the subject matters of the conspiracy were probable and that the matter of the evasion of taxes due and owing the United States for the years 1944, 1945, and 1946 by defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner would be considered, scrutinized and investigated by the Internal Revenue, by the United States Department of Justice, by one or more Federal Grand Juries, and by one or more Courts of the United States. It was from the inception of the conspiracy and throughout the course thereof part of the conspiracy and a principal objective thereof that the true nature of the conspiracy and the acts of the defendants and co-conspirators in pursuance of the conspiracy and in pursuance of the evasion of taxes for the years 1944, 1945, and 1946 would be concealed, misrepresented, and caused to be concealed and misrepresented, whenever and wherever it was sought by any governmental agency to detect and prove the tax evasion and the existence of the conspiracy, and that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive or judicial, of the conspiracy and of tax frauds perpetrated by the defendants and co-

conspirators, through the use of any means whatsoever, including, but not limited to,

(a) the obstruction, impeding and thwarting of investigations, inquiries and proceedings of the Internal Revenue Service, the United States District Court for the Northern District of Illinois, Eastern Division, and Grand Juries of said Court;

(b) the making of and the causing to be made false, fictitious, and fraudulent statements and representations to the Internal Revenue Service and the United States Department of Justice;

(c) the giving of false, fictitious and fraudulent affidavits and testimony to the said Court and Grand Juries of the said Court;

(d) attempts to induce others to give false statements and testimony to the Internal Revenue Service;

(e) the withholding of information from and the refusal to furnish information to the Internal Revenue Service;

(f) submitting and causing to be submitted to the Internal Revenue Service false, fictitious and fraudulent papers and documents;

(g) causing the concealment and destruction of books and records;

(h) obstruction of justice; and

(i) bribery.

Overt Acts.

The Grand Jury further charges that the defendants and co-conspirators, in furtherance of and for the purpose of carrying into execution said conspiracy, combination, confederation and agreement, did and performed the following and other overt acts, to wit:

1. On or about June 21, 1948, defendants Harold E. Sullivan and Byron A. Cain, in New York, New York, had telephone conversations with one H. Stanley Graflund in Chicago, Illinois.

2. On or about June 23, 1948, defendants Harold E. Sullivan and Byron A. Cain and co-conspirator Frank J. Huebner had a conversation with co-conspirator Patrick J. Grace, Jr., in Brooklyn, New York.

3. On or about June 28, 1948, defendant Byron A. Cain and co-conspirator Patrick J. Grace, Jr., had a conversation with David G. Lubben and one Samuel Davidson at the Riviera night club, Fort Lee, New Jersey, and defendant Byron A. Cain and co-conspirator Patrick J. Grace, Jr., asked and urged David G. Lubben to leave the United States for about two years in order that he would not be available as a witness in any tax case involving co-conspirator Shotwell and defendant Byron A. Cain.

4. On or about June 30, 1948, in Chicago, Illinois, defendants Harold E. Sullivan and Byron A. Cain had a conversation with co-conspirator Frank J. Huebner and they told said Frank J. Huebner to keep quiet, to let one man do all the talking to any investigating agents of the Internal Revenue Service, and that the less said to such agents the better.

5. On or about July 9, 1948, defendants Harold E. Sullivan and Byron A. Cain and co-conspirator Patrick J.

Grace, Jr., had a meeting and conversation with one Daniel Tobias in New York, New York.

6. In or about early July 1948, in Chicago, Illinois, defendant Harold E. Sullivan and co-conspirator Frank J. Huebner had a conversation with one Edward Urban and discussed the matter of purchasing certain business interests of David G. Lubben for the purpose of acquiring and destroying books and records of David G. Lubben relating to black market transactions and other transactions with co-conspirator Shotwell.

7. In or about the latter part of July 1948, and in August 1948, in Chicago, Illinois, defendant Byron A. Cain instructed H. Stanley Graflund and one Gladys Morrill to destroy or cause the destruction of records of black market currency received from David G. Lubben by co-conspirator Shotwell in 1945 and 1946.

8. On or about July 21, 1948, defendant Ralph R. Johnson caused the transfer to himself of the United States corporation income tax return of The Shotwell Mfg. Co. for the calendar year 1946.

9. In or about the latter part of July 1948, defendants Byron A. Cain, Leon J. Busby, Ernest J. Sauber and Ralph R. Johnson had a meeting and conversation at the Chicago Athletic Club, Chicago, Illinois.

10. In or about the latter part of July 1948, in Chicago, Illinois, defendant Byron A. Cain had a conversation with co-conspirator Frank J. Huebner, and said Byron A. Cain asked said Frank J. Huebner for $10,000 in currency to take care of and "fix" the tax difficulty they were in.

11. In or about the latter part of July 1948, in Chicago, Illinois, at the request of defendant Byron A. Cain, co-conspirator Frank J. Huebner delivered $5,000 in currency to said Byron A. Cain to take care of and "fix" the tax difficulty they were in.

12. In or about the first week of August 1948, in Chicago, Illinois, defendant Leon J. Busby had a meeting and conversation with Internal Revenue Agent Joseph Lima and delivered to said Joseph Lima a paper containing false, fictitious and fraudulent figures and representations respecting unrecorded and unreported receipts and disbursements of currency by co-conspirator Shotwell during the years 1944, 1945, and 1946.

13. In or about August 1948, in Chicago, Illinois, defendant Byron A. Cain asked co-conspirator Frank J. Huebner for $5,000 in currency as part of the $10,000 in currency which said Byron A. Cain wanted to take care of and "fix" the tax difficulty they were in.

14. In or about August 1948, in Chicago, Illinois, at the request of defendant Byron A. Cain, co-conspirator Frank J. Huebner delivered $5,000 in currency to said Byron A. Cain to take care of and "fix" the tax difficulty they were in.

15. In or about August 1948, in Chicago, Illinois, defendant Ralph R. Johnson instructed Internal Revenue Agent Joseph Lima to make a tax computation and prepare an Internal Revenue Agent's report allowing unsubstantiated disbursements of currency claimed to have been made by co-conspirator Shotwell during the years 1945 and 1946.

16. On or about October 12, 1948, in Chicago, Illinois, defendant Byron A. Cain, in the presence of defendant Leon J. Busby, told Special Agent Sam Krane, Internal Revenue Service, that he would never give any one in the Government any further information concerning unrecorded disbursements of currency purportedly made by co-conspirator Shotwell during the years 1945 and 1946.

17. In or about February 1949, defendant Harold E. Sullivan told co-conspirator Frank J. Huebner that said Frank J. Huebner should stay away from Internal Revenue Agent Charles J. Mammel, that said Frank J. Huebner

should not discuss anything with said Charles J. Mammel, and that the less said the better.

18. In or about September 1949, in Chicago, Illinois, H. Stanley Graflund, acting on instructions of defendant Byron A. Cain, obtained certain records prepared by one Franklin Del Monte and destroyed or caused the destruction of said records.

19. In or about September 1949, in Chicago, Illinois, defendant Ernest J. Sauber had a conversation with Ernest C. Wright, then Internal Revenue Agent in Charge, about termination of an investigation Internal Revenue Agent Charles J. Mammel was conducting with respect to co-conspirator Shotwell.

20. On or about September 29, 1949, in Chicago, Illinois, defendant Byron A. Cain falsely stated to Internal Revenue Agent Charles J. Mammel that he had told said Charles J. Mammel all he knew about overceiling disbursements purportedly made by co-conspirator Shotwell in 1945 and 1946 and that he did not know any further details of said disbursements.

21. On or about October 4, 1949, in Chicago, Illinois, defendants Harold E. Sullivan and Byron A. Cain had a conversation with Ernest C. Wright, then Internal Revenue Agent in Charge, and defendant Harold E. Sullivan stated to said Ernest C. Wright that he and said Byron A. Cain knew to whom overceiling disbursements had been made by or on behalf of co-conspirator Shotwell during 1945 and 1946, but that they would not tell said Ernest C. Wright.

22. On or about October 17, 1950, in Chicago, Illinois, defendant Leon J. Busby made false statements to Internal Revenue Agent Charles J. Mammel concerning meetings and conversations he and defendant Byron A. Cain allegedly had with defendant Ernest J. Sauber in 1948.

23. On or about October 18, 1950, in Chicago, Illinois, defendant Ernest J. Sauber made false statements to Internal Revenue Agent Charles J. Mammel concerning meetings and conversations he allegedly had in March 1948 with defendants Byron A. Cain and Leon J. Busby.

24. On or about November 2, 1950, in Chicago, Illinois, defendants Harold E. Sullivan and Byron A. Cain, in a conversation with Internal Revenue Agent in Charge Ernest C. Wright, stated that they wanted Internal Revenue Agent Charles J. Mammel removed from the investigation of co-conspirator Shotwell, and defendant Harold E. Sullivan stated to said Ernest C. Wright that he and defendant Byron A. Cain did not know to whom overceiling payments were made by or on behalf of co-conspirator Shotwell during the years 1945 and 1946.

25. On or about November 17, 1950, in Washington, D. C., defendant Byron A. Cain had a conversation with Commissioner of Internal Revenue George C. Schoeneman and complained about the length of time of the investigation of co-conspirator Shotwell.

26. On or about November 20, 1950, in Chicago, Illinois, defendant Byron A. Cain falsely stated to Internal Revenue Agent Charles J. Mammel that 50 per cent of the money listed in papers submitted to the Internal Revenue Service as having been received by or on behalf of co-conspirator Shotwell from David G. Lubben as overceiling premiums and for uninvoiced shipments of merchandise was in fact trades and not money.

27. On or about May 9, 1951, Daniel A. Taylor, then attorney for co-conspirator Shotwell, had a conversation with Special Agent Sam Krane and Internal Revenue Agent Charles J. Mammel wherein he asserted that all of the unrecorded and unreported currency received by co-conspirator Shotwell during the years 1944, 1945, and 1946

was, with the exception of $5,898, paid out by co-conspirator Shotwell for the purchase of raw materials.

28. In or about the summer of 1951, in Chicago, Illinois, Daniel A. Taylor, then attorney for co-conspirator Shotwell, had a conversation with Special Agent Sam Krane wherein he asserted that a large part of the over-invoice premium collections listed in papers submitted to the Internal Revenue Service as having been received by co-conspirator Shotwell during 1944, 1945, and 1946 was actually "trades and exchanges" on which no money was received by or on behalf of co-conspirator Shotwell.

29. In or about August 1951, in New York, New York, defendant Byron A. Cain had a conversation with David G. Lubben wherein he attempted to induce said Lubben to falsely state to agents of the Internal Revenue Service that many of the black market transactions between the said Lubben and co-conspirator Shotwell involved exchanges of merchandise rather than currency payments by David G. Lubben to co-conspirator Shotwell.

30. On or about October 16, 1951, in Chicago, Illinois, defendant Ernest J. Sauber wrote a memorandum to Special Agent Sam Krane, in which memorandum said Ernest J. Sauber made false statements concerning meetings and conversations he allegedly had in 1948 with defendants Byron A. Cain, Leon J. Busby and Ralph R. Johnson.

31. On or about March 4, 1952, in Washington, D. C., defendant Leon J. Busby and Daniel A. Taylor, then attorney for defendants Harold E. Sullivan and Byron A. Cain and co-conspirators Shotwell and Frank J. Huebner, had a conference with one James G. Sharon, Jr., an attorney of the United States Department of Justice.

32. On or about March 13, 1952, defendant Harold E. Sullivan, in Miami, Florida, had telephone conversations

with H. Stanley Graflund and Gladys Morrill in Chicago, Illinois.

33. On or about November 12, 1952, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Byron A. Cain gave false testimony concerning an alleged voluntary disclosure purportedly made to the Internal Revenue Service in 1948 by or on behalf of co-conspirator Shotwell.

34. On or about November 12, 1952, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Leon J. Busby gave false testimony concerning an alleged voluntary disclosure purportedly made to the Internal Revenue Service in 1948 by or on behalf of co-conspirator Shotwell.

35. On or about November 13, 1952, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Ernest J. Sauber gave false testimony concerning meetings and conversations he allegedly had in 1948 with defendants Byron A. Cain and Leon J. Busby.

36. On or about November 13, 1952, in Chicago, Illinois, defendant Byron A. Cain had a conversation with co-conspirator Frank J. Huebner concerning the date of an alleged voluntary disclosure to the Internal Revenue Service.

37. On or about October 9, 1953, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Byron A. Cain gave false testimony concerning a conversation he purportedly had with David G. Lubben in September or October, 1945, regarding the time of commencement of over-invoice premium payments on certain sales of merchandise by co-conspirator Shotwell; concerning the period during which over-invoice premium payments were received on certain

sales of merchandise by co-conspirator Shotwell; concerning the amount of over-invoice premium payments and other payments received during the years 1945 and 1946 on certain sales of merchandise by co-conspirator Shotwell; and concerning meetings and conversations with David G. Lubben and Samuel Davidson in about June 1948 and in about August 1951.

38. On or about October 9, 1953, and October 12, 1953, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Harold E. Sullivan gave false testimony concerning the receipt by him of black market money paid by David G. Lubben in 1945 and 1946; concerning meetings and conversations with David G. Lubben in 1945 and 1946; concerning his knowledge of overceiling premium transactions involving David G. Lubben; and concerning his knowledge of uninvoiced shipments of merchandise by co-conspirator Shotwell in 1946.

39. On or about July 20 and 21, 1955, defendant Ernest J. Sauber made false statements in Chicago, Illinois, to Inspectors James E. Yaden and Leonard D. Charles, Internal Revenue Service, concerning meetings and conversations he allegedly had with defendants Byron A. Cain, Leon J. Busby and Ralph R. Johnson in 1948 and 1949.

40. On or about July 20, 1955, defendant Ralph R. Johnson made false statements in Chicago, Illinois, to Inspectors James E. Yaden and Leonard D. Charles, Internal Revenue Service, concerning conversations he allegedly had with defendant Ernest J. Sauber in 1948.

41. On or about February 7, 1956, co-conspirator Shotwell filed and caused to be filed a petition in The Tax Court of the United States, Washington, D. C., verified by the affidavit of defendant Byron A. Cain, which said petition and affidavit were materially false and fraudulent.

42. On or about July 25, 1956, before the April 1956 Term Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois, defendant Ernest J. Sauber gave false testimony concerning meetings and conversations with defendants Byron A. Cain, Leon J. Busby and Ralph R. Johnson in 1948.

In violation of Title 18, Section 88, United States Code (1946 Ed.); 18 U. S. C. 371.

COUNT TWO.

The Grand Jury further charges:

1. That on or about October 9, 1953, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, Harold E. Sullivan, defendant herein, having taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Northern District of Illinois, Eastern Division, which Court was then conducting a trial in a cause entitled The United States of America *vs.* The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, No. 52 CR 143, in which case a law of the United States authorized an oath to be administered, did unlawfully, willfully and knowingly, and contrary to said oath, state material matters which he did not believe to be true, that is to say:

2. That at the time and place aforesaid, the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. Mr. Sullivan, what was the first knowledge you

ever had of Shotwell engaging in any overceiling cash deals with David Lubben?

A. Well, the first knowledge I ever had was in the late summer of 1945.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he knew prior to the summer of 1945 of "Shotwell," that is to say, The Shotwell Mfg. Co., engaging in overceiling cash deals with David Lubben.

In violation of 18 U. S. C. 1621.

COUNT THREE.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the second count of this indictment.

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. Have you ever received any money from David Lubben?

A. None, never.

Q. Have you ever seen him pay any money?

A. I never have.

Q. Has anybody given you any money from David Lubben?

A. No.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that money from David Lubben had been given to him.

In violation of 18 U. S. C. 1621.

COUNT FOUR.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the second count of this indictment.

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters, to wit, the defendant testified that he did not talk to David Lubben about any business matters in the years 1945 and 1946.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he did talk to David Lubben about business matters in the years 1945 and 1946.

In violation of 18 U. S. C. 1621.

COUNT FIVE.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the second count of this indictment.

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

> Q. Mr. Lubben testified here that on about February 14th, 1946, he made out some checks which have holes in them now, and they are Government's Exhibits 14, 14-A and 14-B. One day when he was on the stand he said he came up to your office and showed you those checks. Now, did he ever do any such thing?

A. He never did.

Q. Did you ever see those checks before this trial?

A. I never did.

Q. Now, Mr. Lubben came back the next day and himself dropped that testimony. You heard that, did you?

A. Yes, I did.

Q. But he then said that he had come up to your office in August or September of '46. Did he do that?

A. Mr. Lubben has never been in my office.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he had seen the said checks and in that Mr. Lubben had been in the defendant's office.

In violation of 18 U. S. C. 1621.

COUNT SIX.

The Grand Jury further charges:

1. That on or about October 12, 1953, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, Harold E. Sullivan, defendant herein, having taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Northern District of Illinois, Eastern Division, which Court was then conducting a trial in a cause entitled The United States of America *vs.* The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, No. 52 CR 143, in which case a law of the United States authorized an oath to be administered, did unlawfully, willfully and knowingly, and contrary to said oath, state material matters which he did not believe to be true, that is to say:

2. That at the time and place aforesaid the defendant Harold E. Sullivan, duly appearing as a witness before

the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters, to wit, the defendant testified that he had never seen any money that was paid in cash by David Lubben to or for The Shotwell Mfg. Co., and had never gotten any of the money himself.

3. That the aforesaid testimony of the defendant Harold E. Sullivan, as he then and there well knew and believed, was false and untrue, in that he had seen some of the money paid in cash by David Lubben to or for The Shotwell Mfg. Co., and had gotten some of the said money himself.

In violation of 18 U. S. C. 1621.

COUNT SEVEN.

The Grand Jury further charges:

1. That on or about October 9, 1953, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, Byron A. Cain, defendant herein, having taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Northern District of Illinois, Eastern Division, which Court was then conducting a trial in a cause entitled The United States of America *v.* The Shotwell Manufacturing Company, Byron A. Cain, Harold E. Sullivan, and Frank J. Huebner, No. 52 CR 143, in which case a law of the United States authorized an oath to be administered, did unlawfully, willfully and knowingly, and contrary to said oath, state material matters which he did not believe to be true, that is to say:

2. That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to

material matters in answer to questions propounded to him, as follows:

Q. When was the next transaction in which you had any business discussion with Mr. Lubben?

A. I would say in September or October of 1945.

Q. Where was that?

A. At our office, Shotwell Manufacturing Company.

Q. And who was present?

A. Well, I was with—Mr. Huebner, Mr. Lubben and myself were present. And there may have been others, although I can't place them in there at this time.

Q. What occurred at that conversation?

A. Lubben had been advised prior to that conversation by Mr. Huebner that we would be unable to ship the quantities of merchandise we had been shipping to him, because of the acute shortage in our plant of corn syrup. Lubben contacted Mr. Huebner—

By Mr. Lockley: Just a moment Mr. Cain, I object to any recitation of hearsay by Mr. Cain.

By the Court: Yes.

By Mr. Lockley: What he had to do with this—

By the Witness: I am trying to bring out the reason for the meeting.

By the Court: Your answer wasn't responsive.

By Mr. O'Brien:

Q. Just tell us what occurred in the conversation.

A. Well, a meeting was arranged in my office and Mr. Lubben said that if we would ship him merchandise that he would pay us a cash overage on the merchandise and show us how to go into this market and cause corn to be delivered to the refiners so that the life blood of our business could continue to flow into it, namely, corn syrup.

Q. What was said about the rates of overages to be paid?

A. It may not have been consummated at that one meeting, there may have been two, but the deal was ultimately consummated whereby we started at a rate

of three cents on gum work and five cents on chocolate items that were to be shipped to Eatsum Food Products Company. The money, in turn, was to be turned over to somebody in the Shotwell Manufacturing Company, which, in turn, was to go out for the purchase of raw corn.

Q. Now, did those rates—Well, excuse me. Did you tell Mr. Lubben that you would do that?

A. We did.

Q. And did you proceed to do it?

A. We did, we proceeded to ship him merchandise.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed, was false and untrue, in that the said meeting and conversation of Mr. Huebner, Mr. Lubben and the defendant did not occur.

In violation of 18 U. S. C. 1621.

COUNT EIGHT.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the seventh count of this indictment.

2. That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. Do you know whether or not Mr. Lubben wasn't one of your biggest single customers in that year?

A. Oh, I don't think so. He was one of our larger customers.

Q. He was one of your larger customers?

A. That's right.

Q. And is the same true in 1946?

A. Yes, sir.

Q. Was there any other customer, who didn't have any quota in the base period, given the same amount or nearly that amount of candy as Mr. Lubben was in '45 and '46?

A. No, sir.

Q. And you say he only paid you premiums for this short period from—what are the dates again?

A. September or October of '45 until around July of '46.

Q. But you made pretty substantial sales to him, didn't you, in the months from January to August of 1945?

A. That is correct.

Q. And you continued to make substantial sales to him, didn't you, from July to December of 1946?

A. I think that's correct.

Q. And you mean that the sales that you made from September of '45 until about July or so of 1946 were the only premium sales?

A. That is correct.

Q. And the rest of them, you let him have without any premium whatsoever?

A. That's right.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed, was false and untrue, in that sales made to David Lubben from September 1945 to about July 1946 were not the only premium sales and in that David Lubben paid premiums on sales made to him prior to September 1945 and after about July 1946.

In violation of 18 U. S. C. 1621.

COUNT NINE.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the seventh count of this indictment.

2: That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid, testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. All right. Now, when was it then that you next met Lubben?

A. In the latter part of June of 1948.

Q. Where was it?

A. I met him—

Q. Well, let me put it this way. Will you tell us the circumstances. Where were you and how did you happen to meet him?

A. Well, I was at the Gotham Hotel in New York and I had called Pat Grace and asked him to have dinner with me. Pat is a bachelor and he likes to fill in the time, anyway, so he came down and we had dinner and went up to my room in the Gotham and a phone call came in from Lubben and he asked if he could see me and I said yes. I said, "Yes, Dave, come on over."

He said, "Well, what about meeting me half way?"

I said, "Where would half way be?"

He said, "There is a place on the other side of the George Washington Bridge called the Riviera."

I said, "Fine. I will be over." And asked Pat to go with me and the two of us went to the Riviera and took a table and later on Lubben and Sam Davidson came in.

Q. Had you met Davidson before?

A. I think the first time I ever met Davidson was in connection with the mortgage, which would be before.

Q. Now did they join you at your table?

A. Yes, they did.

Q. And was there a conversation.
A. Yes, there was a conversation.
Q. With four people present?
A. Yes, there was four of us, Pat Grace, Lubben, Davidson, and myself.
Q. What was said?
A. Well, we carried on a general conversation for a while, and then I said, "Dave, what is on your mind? Let us get down to brass tacks."

He said, "Well, I can have an opportunity of getting a franchise for a soft drink in one of the Central or South American countries." I don't recall what it was.

"And I am going to need some money." And he said, "I would like for you to come up with it."

"Well," I said, "I don't know, Mr. Lubben, but," I said, "it isn't concrete now, is it?"

He said, "No."

I said, "Whenever it is concrete, why don't you do this: You call Mr. Grace and if you have something that is concrete and worthy of consideration, I will think about it at that time."

Q. Did you discuss tax matters at that meeting?
A. No, sir.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed, was false and untrue, in that he did discuss tax matters at the said meeting and in that the meeting was requested and arranged by the defendant and not by David Lubben.

In violation of 18 U. S. C. 1621.

COUNT TEN.

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations of paragraph No. 1 of the seventh count of this indictment.

2. That at the time and place aforesaid the defendant Byron A. Cain, duly appearing as a witness before the said Court, and then and there being under oath as aforesaid,

testified falsely before the said Court with respect to material matters in answer to questions propounded to him, as follows:

Q. At the meeting that you had at the night club, the Riviera night club, there was no reference whatsoever made to Mr. Lubben's leaving the United States so he wouldn't be available to testify against you?

A. None.

Q. The sole purpose of that meeting was so Mr. Lubben could borrow some money and buy a soft drink franchise in South America, is that right?

A. That is right.

3. That the aforesaid testimony of the defendant Byron A. Cain, as he then and there well knew and believed was false and untrue, in that at the meeting at the Riviera night club there was a reference to Mr. Lubben's leaving the United States so he wouldn't be available to testify against the defendant and in that the sole purpose of the meeting was not so Mr. Lubben could borrow some money and buy a soft drink franchise in South America.

In violation of 18 U. S. C. 1621.

A True Bill,

/s/ H. Leevane Weaver,
Foreman.

/s/ R. Tieken,
R. Tieken,
United States Attorney,

/s/ Vincent P. Russo,
Vincent P. Russo,
Special Attorney,
Department of Justice,

/s/ Charles A. McNelis,
Charles A. McNelis,
Special Attorney,
Department of Justice.